NO. 27517

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
QUANG DO, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 05-1-1113)

SUMMARY DISPOSITION ORDER
(By: Lim, Presiding Judge, Foley and Fujise, JJ.)

Defendant-Appellant Quang Do (Do) appeals from the Judgment of Conviction and Sentence entered on August 26, 2005 in the Family Court of the First Circuit[1/] (family court). Do was charged with and convicted of Abuse of Family or Household Members in violation of Hawaii Revised Statutes (HRS) § 709-906 (Supp. 2005). The family court sentenced Do to seven days of imprisonment and two years of probation.

On appeal, Do argues that the family court erred by admitting Complainant's written statement to the police (252 statement) into evidence without redacting it to exclude certain statements of alleged prior incidents of abuse that were not relevant and were unduly prejudicial.[2/]

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to

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1/ The Honorable Patrick W. Border presided.

2/ The statement in question reads "he slap me one time last year sometimes he has anger problems he might need counseling I'm not sure if he go do it again."

the arguments advanced and the issues as raised by the parties, we hold:

(a) The majority of Complainant's 252 statement was clearly admissible as a prior inconsistent statement pursuant to Hawaii Rules of Evidence (HRE) Rule 802.1,[3/] which "provides for substantive use of most prior inconsistent witness statements," State v. Eastman, 81 Hawai'i 131, 136, 913 P.2d 57, 62 (1996) (internal quotation marks and citation omitted), and Complainant's 252 statement was inconsistent with her testimony at trial, was recorded in substantially verbatim fashion by some means contemporaneously with the making of the statement, and was offered in conformity with HRE Rule 613(b).[4/] State v. Clark, 83 Hawai'i 289, 295, 926 P.2d 194, 200 (1996).

[3/] Hawaii Rules of Evidence (HRE) Rule 802.1 provides in relevant part:

> **Rule 802.1 Hearsay exception: prior statements by witnesses.** The following statements previously made by witnesses who testify at the trial . . . are not excluded by the hearsay rule:
>
> (1) Inconsistent statement. The declarant is subject to cross-examination concerning the subject matter of the declarant's statement, the statement is inconsistent with the declarant's testimony, the statement is offered in compliance with rule 613(b), and the statement was:
>
> . . . .
>
> (B) Reduced to writing and signed or otherwise adopted or approved by the declarant[.]

[4/] HRE Rule 613(b) requires that, on direct or cross-examination, the circumstances of the prior inconsistent statements have been brought to the attention of the witness and the witness must have been asked whether she made the prior inconsistent statements. State v. Clark, 83 Hawai'i 289, 295, 926 P.2d 194, 200 (1996).

The portions of Complainant's 252 statement reading "he slapped me one time last year," she "wasn't sure if he would do it again," and "he has anger problems" are relevant to demonstrate the context of Complainant's abusive relationship with Do.[5/] HRE Rule 404(b); Clark, 83 Hawai'i at 300-01, 926 P.2d at 205-06.

(3) Where the evidence of prior episodes of domestic violence are admissible to show the fact-finder the nature of the relationship between Complainant and Do, and where the relationship is offered to explain a central and consequential fact (the recanting of Complainant), that evidence is not unduly prejudicial, and therefore the circuit court did not abuse its discretion in ruling that the challenged portions of the 252 statement were more probative than prejudicial. Sato v. Tawata, 79 Hawai'i 14, 19, 897 P.2d 941, 946 (1995).

The other part of the statement, that Do "might need counseling," is not relevant as lay witness opinion, even under the relatively liberal standard set forth in HRE Rule 701 (allowing introduction of lay witness opinion if the opinion or inference is "(1) rationally based on the perception of the witness, and (2) helpful to clear understanding of the witness' [sic] testimony or the determination of a fact in issue.").

[5/] In the circuit court's hearing on the defense's motion in limine concerning the statement, the prosecutor referred quite clearly to Clark and noted that the State was offering the evidence for purpose of showing the nature of the relationship between Complainant and Do.

State v. Bermisa, 104 Hawai'i 387, 397, 90 P.3d 1256, 1266 (App. 2004). However, the circuit court did not abuse its discretion by admitting the disputed phrase because this statement was far less damaging than the other three challenged portions, and Do therefore suffered no substantial detriment by its admission. State v. Toyomura, 80 Hawai'i 8, 23-24, 904 P.2d 893, 908-09 (1995) ("Generally, to constitute an abuse [of discretion,] it must appear that the [trial] court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.").

Therefore,

The Judgment of Conviction and Sentence entered on August 26, 2005 in the Family Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, November 3, 2006.

On the briefs:

Jon N. Ikenaga,
Deputy Public Defender,
for Defendant-Appellant.

Sonja P. McCullen,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Presiding Judge

Associate Judge

Associate Judge